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**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

JUSTIN LEE TRIPP,

Petitioner,

vs.

JOE LOMBARDO, *et al.*,

Respondents.

2:17-cv-02385-JCM-GWF

ORDER

15 This habeas matter comes before the court on a pending show-cause inquiry as to
16 whether the petition is subject to dismissal for failure to state a claim, mootness, and lack of
17 exhaustion, as well as upon petitioner's motion (ECF No. 20) for appointment of counsel.
18 This order follows upon the court's earlier show-cause order (ECF No. 17) and petitioner's
19 response thereto (ECF No. 19).

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Background

Petitioner Justin Tripp originally filed the current petition under 28 U.S.C. § 2241 in the Western District of Washington on or around July 7, 2017. That court transferred the action to this court, and the matter was docketed in this court initially on September 12, 2017.

Tripp's federal petition alleged, *inter alia*, that: (1) petitioner had been sentenced to a term of imprisonment of 36 months and 36 months of supervised release in a federal criminal case in the Western District of Washington; (2) he absconded from supervised release in or about September 2014; (3) he had been detained since March of 2016 by Nevada state authorities ostensibly on a state criminal prosecution; (4) a federal detainer had been lodged

1 against him with regard to revocation of his supervised release vis-à-vis the Washington
2 federal conviction; (5) Nevada state authorities allegedly were holding petitioner only to
3 release him to federal authorities pursuant to the detainer, with no real interest in pursuing
4 state charges against him; (6) there thus allegedly had been no proceedings in the state court
5 case, without an indictment, arraignment or preliminary hearing; and (7) the failure of federal
6 officials to pursue his extradition for revocation proceedings in federal court in Washington
7 allegedly was preventing Nevada state authorities from dismissing his Nevada case.

8 Petitioner requested in the main that the Washington federal district court issue a writ
9 of habeas corpus ad testificandum ordering the United States Marshal to take custody of
10 petitioner in Nevada and bring him before that court for revocation proceedings.

11 On December 14, 2017, this court denied petitioner's pending pauper application and
12 gave him thirty days to pay the filing fee. The receipt from petitioner's payment of the filing
13 fee was entered on January 4, 2018, posturing the matter then for screening review.

14 Meanwhile, during the pendency of this federal action, Nevada state authorities
15 prosecuted the state criminal proceeding through to a judgment of conviction. The matter was
16 bound over from the justice court to the state district court on September 22, 2017, under
17 docket number 17C326718, with petitioner having unconditionally waived a preliminary
18 hearing.¹ An information was filed in the district court on September 25, 2017. Petitioner was
19 arraigned on September 26, 2017; and he entered a guilty plea at that time, pursuant to a
20 written plea agreement, of felony unlawful possession of an electronic stun device and felony
21 resisting a public officer with the use of a dangerous weapon. Petitioner was sentenced on
22 November 15, 2017, to 24 to 60 months on the first charge with a concurrent sentence of 12
23 to 48 months on the second charge and further with 604 days credit for time served. The
24 judgment of conviction was filed on November 29, 2017.

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26 ¹The court has taken judicial notice in the show-cause order and herein of the online docket records
27 of the state district court and state appellate courts. See, e.g., *Harris v. County of Orange*, 682 F.3d 1126,
28 1131-32 (9th Cir. 2012). The accuracy of the procedural recital in the prior order has not been challenged
herein. The online docket records of the state courts may be accessed from: <https://nvcourts.gov/Supreme/>
and <https://www.clarkcountycourts.us/Anonymous/default.aspx>.

1 The time to file a direct appeal from the judgment of conviction expired on December
2 29, 2017. The state district court online docket sheet does not reflect that petitioner filed a
3 direct appeal, and he has filed no other papers in that court since the November 29, 2017,
4 judgment of conviction. The state appellate courts' online docket further does not reflect that
5 he has filed any other proceeding in those courts seeking to present any claims for review.

6 Petitioner currently is in the custody of the state corrections department.

7 ***Discussion***

8 ***Failure to State a Claim***

9 A defendant does not have a right to compel his extradition to face a revocation
10 proceeding following the filing of a federal detainer. A defendant does have a due process
11 right to a reasonably prompt hearing on revocation of supervised release. See, e.g. *United*
12 *States v. Gavilanes-Ocaranza*, 772 F.3d 624, 628 (9th Cir. 2014); *United States v. Santana*,
13 526 F.3d 1257, 1259 (9th Cir. 2008). However, that right is not triggered until the violator is
14 taken into federal custody on the violation warrant. Accordingly, that right is not triggered
15 when the federal warrant instead remains unexecuted and merely has been placed as a
16 detainer at a state institution where the violator is in custody on other charges. See *Moody*
17 *v. Daggett*, 429 U.S. 78, 86-89 (1979)(parole violation warrant); *United States v. Bartholdi*,
18 453 F.2d 1225, 1226 (9th Cir. 1972)(probation violation warrant);² *United States v.*
19 *Magana-Colin*, 2009 WL 5103107 (9th Cir. 2009)(supervised release violation warrant). The
20 defendant accordingly cannot compel federal authorities to writ the defendant out of state
21 custody into federal custody for purposes of executing the federal supervised release violation
22 warrant, and he is not entitled to a revocation hearing on the supervised release violation
23 charges before any state court proceedings and associated state custody have concluded.
24 See, e.g., *Moody*, 429 U.S. at 87-88; see generally *Williams v. Central District of California*,
25 2017 WL 5495518, at *3 & nn. 5 & 6 (C.D. Cal., Nov. 15, 2017).

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27 ²Although *Moody* and *Bartholdi* respectively involved a parole violation warrant and a probation
28 violation warrant, proceedings for revocation of probation, parole and supervised release are treated as
equivalents for due process purposes. *Santana*, 526 F.3d at 1259 n.2.

1 The current petition, which seeks to compel petitioner's extradition from state custody
2 to federal custody in Washington to face a supervised release revocation proceeding,
3 therefore fails to state a claim upon which relief may be granted. Petitioner's arguments in
4 his show-cause response beg the question. He cannot compel federal authorities to writ him
5 out of state custody into federal custody on the violator warrant, and he cannot compel the
6 holding of a revocation hearing in federal court before his state custody is concluded.³

7 The original petition therefore will be dismissed for failure to state a claim upon which
8 relief may be granted to the extent that petitioner seeks an order compelling his extradition
9 for a revocation proceeding in Washington federal court and any related requests for relief.

10 ***Mootness***

11 The original petition further has been mooted by the intervening state court
12 proceedings. The gravamen of the original petition was that petitioner was being held by
13 Nevada state authorities for federal authorities with no actual intention to obtain a state
14 criminal conviction. That core allegation of the petition has been undercut by the state
15 proceedings that followed only a short time thereafter, in which petitioner was convicted of
16 multiple felonies, sentenced, and incarcerated in the state corrections department under a
17 judgment of conviction. Petitioner's arguments in the show-cause response beg the question
18 as to the mootness of the original petition, which is the only pleading before the court.

19 The original petition further will be dismissed as moot.

20 ***Lack of Exhaustion***

21 Petitioner urges in his show-cause response that his Nevada state conviction should
22 be set aside due to, *inter alia*, alleged ineffective assistance of counsel. As noted in the
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24 ³The petition fails to state a claim in this regard, in any federal court. Petitioner requests that this
25 court either hold the revocation hearing on the Washington federal criminal case and recall the warrant or
26 order that petitioner be transferred to the Washington federal court to have a revocation hearing. Petitioner
27 has no legal right, in any court, to compel a revocation hearing prior to the time that he is taken into federal
28 custody after his state custody is concluded on his pending conviction. This court further clearly has no
jurisdiction to hold a revocation hearing in a Washington federal criminal case. Nor will it order that petitioner
be transferred to Washington for such a hearing when petitioner has no legal right to compel such a hearing
at this point. The petition simply fails to state a claim upon which relief may be granted in this regard.

1 show-cause order, any effort to challenge petitioner's Nevada state conviction would be futile
2 at this juncture given that petitioner has not exhausted any federal constitutional claims in the
3 state courts. Since the filing of the November 29, 2017, judgment of conviction, petitioner has
4 not filed a direct appeal, a state post-conviction petition, or any other paper in any state court
5 seeking to challenge his Nevada state conviction.

6 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust state court
7 remedies on a claim before presenting that claim to the federal courts. To satisfy this
8 exhaustion requirement, the claim must have been fairly presented to the state courts
9 completely through to the highest state court level of review available. *E.g., Peterson v.*
10 *Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329 F.3d 1069,
11 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific federal
12 constitutional guarantee upon which he relies and must also state the facts that entitle him
13 to relief on that federal claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir. 2000).
14 That is, fair presentation requires that the petitioner present the state courts with both the
15 operative facts and the federal legal theory upon which the claim is based. *E.g., Castillo v.*
16 *McFadden*, 399 F.3d 993, 999 (9th Cir. 2005). The exhaustion requirement insures that the
17 state courts, as a matter of federal-state comity, will have the first opportunity to pass upon
18 and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman v.*
19 *Thompson*, 501 U.S. 722, 731 (1991).

20 Petitioner herein has not presented any claim to any state court in any proceeding
21 subsequent to the November 29, 2017, judgment of conviction challenging that judgment. He
22 thus has no exhausted claims that could be presented herein.

23 Petitioner's failure to file a timely direct appeal from his conviction does not lead to a
24 conclusion either that petitioner has no available state remedies and/or that his claims are
25 technically exhausted by a procedural default of his claims. Rather, petitioner may file a
26 timely state post-conviction petition presenting claims, *inter alia*, challenging his plea based
27 upon ineffective assistance of counsel within one year of – given the absence of a timely
28 appeal – the entry of judgment on November 29, 2017. *See* N.R.S. 34.726(1). He further

1 potentially may seek therein to establish grounds, if he has viable such grounds, for an out-
2 of-time direct appeal pursuant to Nevada Rule of Appellate Procedure 4(c).

3 What petitioner generally may not do, however, is decline to pursue any state court
4 judicial remedies through to the highest state court level of review available and simply
5 proceed to federal court with wholly unexhausted claims.

6 That is what petitioner seeks to do here, and he presents no viable argument as to why
7 any attempt to challenge the November 29, 2017, conviction also should not be dismissed
8 without prejudice for lack of exhaustion.

9 This action therefore will be dismissed without prejudice also for lack of exhaustion to
10 the further extent that petitioner seeks to challenge his Nevada state conviction herein.⁴

11 ***Motion for Appointment of Counsel***

12 On petitioner's motion for appointment of counsel, the Sixth Amendment right to
13 counsel does not apply in habeas corpus actions. See *Knaubert v. Goldsmith*, 791 F.2d 722,
14 728 (9th Cir. 1986). However, 18 U.S.C. § 3006A(a)(2)(B) authorizes a district court to
15 appoint counsel to represent a financially eligible habeas petitioner whenever "the court
16 determines that the interests of justice so require." The decision to appoint counsel lies within
17 the discretion of the court; and, absent an order for an evidentiary hearing, appointment is
18 mandatory only when the circumstances of a particular case indicate that appointed counsel
19 is necessary to prevent a due process violation. See, e.g., *Chaney v. Lewis*, 801 F.2d 1191,
20 1196 (9th Cir.1986).

21 The interests of justice do not require or warrant the appointment of counsel herein.

22 At the outset, the relatively short-duration sentences involved do not weigh in favor of
23 utilizing limited public defense resources for this case. While petitioner complains of the
24 prejudgment delay in the state proceedings, the state district court's online minute entry

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26 ⁴The show-cause order noted that petitioner had not sought to challenge his Nevada judgment of
27 conviction in an amended petition that was filed pursuant to 28 U.S.C. § 2254 and that was brought against
28 his current custodian. Petitioner, to this date, still has not done so. He still names improper respondents,
such as the local sheriff, with regard to any challenge to his state custody. Any further proceedings herein in
that regard in all events would be futile given the complete lack of exhaustion.

1 reflects that he was given 604 days credit for the prejudgment time served at the time of his
2 sentencing, with his sentences thus running from on or about March 21, 2016. He was
3 sentenced to concurrent sentences of 24 to 60 months and 12 to 48 months. With the 604
4 days of presentence credit and petitioner's eligibility for statutory sentencing credits thereafter,
5 petitioner could be fully released from state custody as early as February 2019 – if he is not
6 paroled out of state physical custody prior to that time during the months remaining in 2018.

7 Over and above the relatively short-duration sentences presented, petitioner fails to
8 present a viable basis for seeking the relief sought in this particular proceeding at this
9 juncture, for the reasons previously discussed herein. To the extent that petitioner seeks to
10 compel a revocation proceeding in Washington federal court, he has no legal right to do so
11 at this juncture. Moreover, given the short-duration sentences, he in any event may well have
12 a revocation proceeding in a relatively short period of time, once he is released by the state.
13 To the extent that petitioner also now seeks to challenge his state conviction, his claims
14 clearly are completely unexhausted. He thus has no viable basis for seeking the relief sought
15 in this proceeding at this juncture.

16 While petitioner fails to present a viable basis for relief in this proceeding, petitioner
17 nonetheless has demonstrated an adequate ability to present his position *pro se*. The action
18 is being dismissed not because petitioner has been unable to articulate his position; the action
19 is being dismissed because the position that he articulates lacks any merit under the
20 governing law. There is no potentially viable basis for obtaining the relief sought that could
21 be more effectively presented with appointed counsel. Petitioner's efforts, first, to compel a
22 revocation proceeding in the Washington federal criminal case prior to his release from state
23 custody and, second, to obtain federal habeas review of completely unexhausted claims
24 challenging his state conviction both are fundamentally flawed.

25 The court therefore will not appoint counsel for a petitioner with likely only months left
26 in his short-duration state sentences to pursue such fundamentally flawed requests for relief.

27 The court informs petitioner, now for a second time, that a one-year state limitations
28 period for seeking state post-conviction relief runs from the November 29, 2017, entry of the

1 judgment of conviction. (See *also* ECF No. 17, at 5.) If petitioner fails to timely seek state
2 post-conviction relief, he may give rise to a situation in which he may not be able to obtain a
3 review on the merits of his claims challenging his state court conviction, in any court.
4 Petitioner's pursuit of the present action in federal court, including any appeal from this
5 dismissal, has not stopped and will not stop the running of either the state or federal
6 limitations period. The burden of timely seeking appropriate relief in an appropriate
7 proceeding at all times remains with petitioner.

8 IT THEREFORE IS ORDERED that this action shall be DISMISSED without prejudice:
9 (a) for failure to state a claim upon which relief may be granted to the extent that petitioner
10 seeks an order compelling his extradition for a revocation proceeding in Washington federal
11 court and any related requests for relief; (b) for mootness to the extent that petitioner
12 challenged his pretrial detention by state authorities; and (c) for lack of exhaustion to the
13 extent that petitioner now would seek to challenge his state court judgment of conviction.

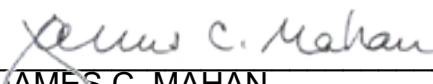
14 IT FURTHER IS ORDERED that a certificate of appealability is DENIED. Jurists of
15 reason would not find it debatable as to whether the district court is correct in its procedural
16 ruling dismissing the petition without prejudice, for the reasons discussed herein.

17 IT FURTHER IS ORDERED that petitioner's motion (ECF No. 20) for appointment of
18 counsel is DENIED.

19 IT FURTHER IS ORDERED that the clerk of court shall make informal electronic
20 service upon respondent state attorney general Adam P. Laxalt and direct a notice of
21 electronic filing of this order to his office. **No response is required from respondent Laxalt
22 other than to respond to any orders of a reviewing court.**

23 The clerk of court shall enter final judgment accordingly, dismissing this action without
24 prejudice.

25 DATED: June 21, 2018.

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JAMES C. MAHAN
United States District Judge